88-17

Supreme Court, U.S.
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No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

HERMAN BROTHERS, INC.,
and BULK, INC.

Petitioners,

v.

TEAMSTERS LOCAL UNION NO. 430

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. When dealing with a motion for sanctions under Fed. R. Civ. P. 11,

a. Whether the court, in the context of deciding whether counsel's conduct in filing a paper was reasonable under the circumstances, should consider legal theories which counsel could have advanced, but did not in fact advance until after the case is decided on the merits; and

b. Whether the court can find as a reasonable argument for the extension, modification, or reversal of existing law an argument which itself flies in the face of settled Supreme Court precedent?

PARTIES

The parties to the proceedings in the court below were: Teamsters Local Union No. 430, Cement Express, Inc., Lehigh Portland Cement Company, Bulk, Inc. and Herman Brothers, Inc.*

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* Bulk, Inc. and Herman Brothers, Inc. are a privately owned corporations. Bulk, Inc. and Herman Brothers, Inc. have interests in, or have as subsidiaries, or are affiliates of the following business entities:

Transwood, Inc.
Leaseco, Inc.
Lahoma, Inc.
J.C. Fleming, Inc.
Saxet, Inc.

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IN THE

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Petitioners,

v.

TEAMSTERS LOCAL UNION NO. 430

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Herman Brothers, Inc. and Bulk, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 9, 1988.

OPINIONS BELOW

The unreported memorandum opinion and order of the United States District Court for the Middle District of Pennsylvania, dated January 30, 1986, appears in the Appendix at A21 to A28. The unreported opinion on the merits of the Court of Appeals, dated October 27, 1986, appears in the Appendix at A12 to A18. The Court of

Appeals opinion on the award of sanctions, dated March 9, 1988, is reported at 841 F.2d 66 and is reproduced in the Appendix at A2 to A11. The Court of Appeals Order, dated April 7, 1988, denying Petitioners' Petition for Rehearing is unreported and is reproduced in the Appendix at A1.

JURISDICTIONAL STATEMENT

The Court of Appeals denied Petitioners' petition for rehearing on April 7, 1988. Jurisdiction of this Court is proper under 28 U.S.C. §1254(1).

RULE INVOLVED

Rule 11 of the Federal Rules of Civil Procedure provides, in pertinent part:

> Signing of Pleadings, Motions, and Other Papers; Sanctions
>
> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. . . .
>
> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . .
>
> If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who

signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

STATEMENT OF CASE

Cement Express, Inc. ("Cement Express") had a collective bargaining agreement with Respondent, Teamsters Local Union No. 430 ("Union") to haul cement for Cement Express under a cartage contract between Cement Express and Lehigh Portland Cement Company ("Lehigh"). App. at A3. The collective bargaining agreement provided in part that it was "binding upon the parties thereto, their successors, administrators, executors and assigns." App. at A22. In April, 1985, Lehigh terminated its contract with Cement Express and entered into an agreement with Petitioner, Bulk, Inc. ("Bulk"). Bulk purchased several trucks from Cement Express and invited the employees of Cement Express to submit employment applications. *Id.* Herman Brothers, Inc. ("Herman"), a separate corporation commonly owned with Bulk, had no operations in connection with Lehigh. Petitioners, Herman and Bulk, never entered into a collective bargaining agreement with the Union, and the Union did not represent any of their employees. *Id.*

In May, 1985, the Union filed a grievance against Herman, Bulk and Cement Express. *Id.* After being notified about the grievance by the Union's counsel, Herman and Bulk informed the Union's counsel that there was no basis for the grievance because there was no contract with the Union, and that there was no duty to arbitrate. App. at A22-23. Herman and Bulk did not attend the arbitration. The arbitration proceeded and the panel ruled that Herman, Bulk and Lehigh were all

successors to Cement Express and bound by the terms of the collective bargaining agreement. *Id.*

The Union filed an action in the district court pursuant to 29 U.S.C. §185 seeking enforcement of the arbitration award. App. at A21. Lehigh filed a motion for judgment on the pleadings; Herman and Bulk filed motions for summary judgment and for sanctions under Rule 11 of the Federal Rules of Civil Procedure. *Id.* The only arguments raised by the Union in support of the validity of the complaint were that the district court should defer to the arbitrator's decision and that Herman, Bulk, and Lehigh should be bound to the collective bargaining agreement by virtue of the "successors and assigns" clause of an agreement, ignoring the fact that they never signed or acknowledged the agreement, and ignoring the fact that former Cement Express employees never comprised a majority of Bulk's employees. App. at A23, n.3, A24. The district court granted Lehigh's motion for judgment on the pleadings, noting that because Lehigh had not been given any notice of the arbitration hearing, it had not been accorded any form of due process, and therefore, the award was a nullity. App. at A26.

The district court granted Herman and Bulk summary judgment because it found that there was no basis in law or fact for concluding that they had agreed to honor the Union's collective bargaining agreement. App. at A25. The district court also awarded Herman and Bulk attorneys' fees under Rule 11, finding that a reasonable inquiry under Rule 11 would have revealed that there was no legal basis for the Union's claim. App. at A26. The district court also found that the Union had been warned on several occasions by Herman and Bulk that there was no basis for its claim and therefore that its claim was based on surmise and speculation. *Id.* The Union filed a motion for reconsideration of the district court's order and judgment. The district court denied

the Union's motion, finding that the Union was merely attempting to relitigate the issues. App. at A20.

The Union appealed the district court's orders granting summary judgment in favor of Herman and Bulk, granting judgment on the pleadings to Lehigh, and awarding all defendants attorneys' fees. App. at A12-13. The Third Circuit affirmed the district court's decisions on the merits. The Court of Appeals agreed with the district court that the arbitration award was a nullity as to Lehigh because it had never been notified of the grievance. App. at A16.

The Court of Appeals then considered the arguments raised by the Union concerning its claims against Herman and Bulk. The court dismissed the Union's arguments that the district court should enforce the arbitral decision because courts are bound by arbitrators' decisions and that Herman and Bulk waived any objection to the arbitrators' jurisdiction by not suing to enjoin the arbitration or by appearing at the arbitration to protest jurisdiction. *Id.* The Court of Appeals dismissed these arguments stating:

> The law plainly states, however, that questions of arbitrability are for the courts, *American Bell, Inc. v. Federation of Telephone Workers*, 736 F.2d 879, 884 (3d Cir. 1984), and defendants obviously could not waive their rights by refusing to appear before a tribunal which held no jurisdiction over them.
>
> App. at A17.

The Court of Appeals also dismissed the Union's argument that Herman and Bulk had a duty to arbitrate under the terms of the agreement between the Union and Cement Express, citing the clearly controlling precedent of *Howard Johnson Co. v. Detroit Joint Board, Hotel and Restaurant Employees,* 417 U.S. 249, 258 n.3 (1974). *Id.*

Finally, the Court of Appeals dismissed the Union's remaining contention, raised for the first time on appeal, that Herman and Bulk had a duty to arbitrate under the doctrine of implied successorship established in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), and clarified in *Howard Johnson*. The court concluded that the Union's allegations were insufficient to impose a duty to arbitrate on Herman and Bulk under controlling precedent. App. at A17-18.

The Court of Appeals dismissed the Union's appeal from the district court's order awarding attorneys' fees as interlocutory, since the amount of the fee award had not been fixed. App. at A18.

In August, 1987, the district court awarded Herman and Bulk attorneys' fees in the amount of $3,852.48. App. at A19. The Union appealed the district court's order. The Third Circuit reversed. The Court of Appeals, relying on its decision in *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 485 (3d Cir. 1987), stated that its "review of the imposition or denial of sanctions under Rule 11 is limited to determining whether the district court has abused its discretion." App. at A6. (Citation omitted). The Court of Appeals stated that "[t]he standard for testing conduct under Rule 11 is reasonableness under the circumstances," App. at A7 (citations omitted) or, in other words, the court "should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading . . . was submitted." *Id.* (Citation omitted). In cases involving Rule 11 motions for the initiation of litigation, the Court of Appeals stated that sanctions "are appropriate regarding the initiation of a lawsuit only if the filing of the complaint constituted abusive litigation or misuse of the court's process." *Id.*

Examining the district court's decision, the Court of Appeals observed that the district court erred in basing its imposition of sanctions in part on a finding that the Union " 'made no effort under Rule 56 to sustain its allegations.' " App. at A8. (quoting App. at A26.) The

Court of Appeals stated "Rule 11 may not be invoked because an attorney, after time for discovery, is unable to produce adequate evidence to withstand a motion for summary judgment." App. at A8.

The Court of Appeals then reviewed the district court's decision and stated that the district court did not explicitly refer to the allegations of the complaint and improperly relied on *NLRB v. Burns Int'l. Security Services, Inc.*, 406 U.S. 272 (1972). App. at A8-9. The Court of Appeals stated that *Burns* was not controlling because it did not involve the duty to arbitrate. According to the Court of Appeals, *Burns* only addressed the duty of successor employers to be bound to the *substantive* provisions of a collective bargaining agreement. Characterizing, the duty to arbitrate as *procedural*, the Court of Appeals concluded that *Burns* was inapposite. *Id.*

The Court of Appeals next addressed the Union's argument that its complaint was based on an attempt to extend the doctrine of successor liability. Recognizing that under the teaching of *Wiley*, facts may give rise to a limited extra-contractual duty to arbitrate, the Court of Appeals stated that Union's argument for holding Herman and Bulk subject to the arbitration provisions of the collective bargaining agreement which they did not sign "appears to be that the defendants, having knowledge of Cement Express' obligation under the collective bargaining agreement and perhaps cooperating to some extent in its breach, were bound by their acceptance of the assets to submit to arbitration." App. at A10. The Court of Appeals stated that no federal court had decided whether a breach of a restraint-on-transfer clause justified imposition of the duty to arbitrate on a transferee who had knowledge of the obligation. *Id.*

Conceding that under *Wiley* an employer has no duty to submit to arbitration if the arbitration clause does not bind it at all, since it is an issue for a court rather than an arbitrator, the Court of Appeals characterized

the Union's submission of the dispute to arbitration prior to a judicial determination of the parties' duty to arbitrate at all as a "tactical error." App. at A10. The Court of Appeals stated that Rule 11 was not designed to penalize an improper submission to arbitration but to penalize "abuse of district court process." *Id.* The Court of Appeals claimed that the threshold question in determining whether the action is a frivolous one is the same whether the action is one to compel arbitration or to confirm an arbitral award:

> The Rule 11 question in either case is whether, at the time he filed the complaint, counsel for the union *could reasonably have argued* in support of the arbitrator's jurisdiction over the controversy.
>
> App. at A11. (emphasis added)

Claiming that the Union's expanded theory of the arbitrability of successor liability was not plainly unreasonable, the Court of Appeals found that the district "abused its discretion in awarding attorneys' fees under Rule 11" and reversed the district court's order. *Id.*

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS AND WITH RULE 11 ITSELF.

While Rule 11 was not designed to chill advocacy, Fed. R.Civ.P., Advisory Committee Notes, part of its purpose was to place an obligation on counsel to engage in some investigation of the facts and the law before instituting an action. *See* Schwarzer, *Sanctions Under New Rule 11 — A Closer Look*, 104 F.R.D. 181, 186-95 (1985). However, as noted by the Advisory Committee, "[t]he court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe *at the time the pleading . . . was submitted.*" (Emphasis supplied). The

Committee noted that "reasonableness" was to be measured by "reasonableness under the circumstances."

The Circuit Courts have rather uniformly applied an objective test to determine whether the conduct of the signer was reasonable under the circumstances at the time that the pleading was signed. *INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391 (6th Cir.), *cert. denied*, 1108 S.Ct. 291 (1987); *O'Connell v. Champion International Corp.*, 812 F.2d 393 (8th Cir. 1987); *Robinson v. National Cash Register*, 808 F.2d 1119 (5th Cir. 1987); *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3627 (1988); *Burkhart v. Kinsley Bank*, 804 F.2d 588 (10th Cir. 1986); *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir.), *cert. denied*, 107 S.Ct. 181, 1986); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986); *Eastway Construction Corporation v. City of New York*, 762 F.2d 243 (2d Cir. 1985), *cert. denied*, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987). The signer's good faith is not relevant, *Baker v. Citizens State Bank*, 661 F.Supp. 1196 (D. Minn. 1987); *Cabell v. Petty*, 810 F.2d 463 (4th Cir. 1987); *INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc., supra; Robinson v. National Cash Register, supra; Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1373, 94 L.Ed.2d 689 (1987); *Thornton v. Wahl, supra*, nor is the propriety of the signer's purpose. *Cabell v. Petty, supra.*

This case raises the issue, dealt with ambiguously by several Circuits and clearly by the Third Circuit, of whether the mere existence of "existing law, or a good faith argument for the extension, modification, or reversal of existing law" can insulate counsel from the imposition of sanctions, although the "argument" was never made on the merits of the case. The Court of Appeals for the Third Circuit held in this case that "The Rule 11 question . . . is whether at the time he filed the complaint, counsel . . . could reasonably have argued in

support [of the complaint]." App. at A11. This analysis is in conflict with the decisions of other Courts of Appeals, which have analyzed Rule 11 sanctions in the context of what the signer actually did, rather than what he could have done. It also runs counter to the clear language of Rule 11.

In *Szabo Food Service, Inc. v. Canteen Corp., supra*, the Seventh Circuit Court of Appeals clearly indicated that the conduct of the signer was to be judged by what was actually done. In that case, counsel was advocating a position which was in fact contrary to existing law. Rather than addressing the contrary law, counsel chose simply to ignore it. The court first acknowledged that the bare pleading generally will not, nor should it, evidence on its face the detailed legal basis for the action:

> The complaint need not and should not contain citations or legal argument. To find out whether it was the opening shot in a campaign for some new legal principle, a court must examine what the lawyers later say about their work. . . . The only way to find out whether a complaint is an effort to change the law is to examine with care the arguments counsel later adduce.
>
> 823 F.2d at 1082.

The Court then noted that it is counsel's conduct which must be examined:

> When counsel represent that something cleanly rejected by the Supreme Court is governing law, then it is appropriate to conclude that counsel are not engaged in trying to change the law; counsel are either trying to buffalo the court or have not done their homework. Either way, Rule 11 requires the court to impose a sanction — for the protection of the judicial process as much as to relieve the financial burden that baseless litigation imposes on the other side.
>
> *Id.*

Thus, the *Szabo* court interpreted the pleading which was alleged to be sanctionable in light of what arguments were made by counsel to support the complaint. It held that the sanctions would be appropriate if counsel was trying to "buffalo" the court by ignoring existing law, even though a reasonable argument could have been made to change the law.

The Ninth Circuit has rejected this view. In *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986), the court reversed the district court's imposition of sanctions where counsel argued that existing law supported its position instead of acknowledging that the weight of authority was against that position and arguing that the law should be extended. The court likewise rejected the notion that a pleading which was on its face nonfrivolous could be deemed to be frivolous once the theory of the case advanced in support of the pleading was determined to be frivolous.

A *sua sponte* suggestion for rehearing *en banc* was denied without supporting opinion. The denial, however, sparked an analytical dissent on the part of five circuit court judges. *Golden Eagle Distribution Corp. v. Burroughs Corp.*, 809 F.2d 584 (9th Cir. 1987). The dissent stated:

> How can a brief be warranted by existing law if its argument goes in the face of "directly contrary" authority? . . . How can a brief be warranted to be "a good faith argument for the extension, modification, or reversal of existing law" when there is not the slightest indication that the brief is arguing for extension, modification or reversal?
>
> To ask these questions is to answer them. An argument in the teeth of uncited and undistinguished contrary authority is not warranted by existing law. An argument that does not mention

> directly-contrary authority is not a good faith argument for its modification or reversal.
>
> 809 F.2d at 586.

In this case, the signer proceeded at the district court level on the theory that the court should enforce the arbitral award in light of federal policy favoring collective bargaining arbitration.[1] It was not until after the district court granted summary judgment on the merits and imposed sanctions that the signer raised any legal arguments as to why Herman and Bulk should be compelled to submit to the arbitral award, other than the existence of the award itself.

The Third Circuit addressed these arguments and rejected them, as it had on the appeal on the merits. However, it characterized the arguments as "not plainly unreasonable." It then held that because those arguments *could have been made* to support the complaint — although they were not in fact made — no sanctions should be awarded under Rule 11. App. at A11. The decision of the court below conflicts with the Circuit Court decisions cited above starkly, as it not only does not require the reasonable basis for the pleading to be identifiable from the pleading, it does not require that a reasonable basis for the pleading be advanced or apparent at all during the course of litigation on the merits. Although the court below announced that it was applying an objective test, it did not do so, ignoring what

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1. In support of deferral to the arbitral award the signer also advanced the argument that there were facts from which the arbitral panel could have concluded that Herman and Bulk independently adopted the collective bargaining agreement. This argument was *not* made for the purpose of persuading the court that Herman and Bulk did in fact independently assume the agreement, nor was it made for the purpose of establishing the fundamental duty to arbitrate; rather, it was made only to persuade the court that the panel had sufficient facts before it to conclude that Herman and Bulk had adopted the contract.

counsel actually did in the litigation in favor of what he could have done. It has, after litigation on the merits is over, allowed counsel to justify the filing of the pleading based on subjective intent to raise an argument that was not raised. The Court's holding thus clearly contravenes the mandate of the Advisory Committee that the courts not use hindsight to judge the conduct of the signer.

In this case, the argument for the extension of the law of successorship was not made in the cause of advocacy of a client; rather, it was made after the client's cause was lost at the trial and appellate level and after sanctions had been imposed. Thus, the advocacy, if any there was, was not for the purpose of furthering the client's cause. It was for the sole purpose of avoiding counsel's liability for sanctions.

The Third Circuit has expressed reluctance in affirming sanctions under Rule 11, *Giardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3d. Cir. 1987), voicing concern over the spawning of so-called "Rule 11 satellite litigation." *See, Morristown Daily Record v. Graphic Corp., Local 8N*, 832 F.2d 31, 32 n.1 (3d Cir. 1987). Rather than reducing such satellite litigation, the decision of the Court of Appeals will encourage it, spurring counsel who bring and manage frivolous actions to create issues long after the client's interest in those actions has passed solely for the purpose of avoiding sanctions. The issue in this case, therefore, will determine whether Rule 11 will serve to make counsel more responsible for their pleadings and better advocates for their clients' just causes *after* reasonable investigation, as the Rule would appear to dictate, or allow counsel to reserve their most creative efforts for themselves, after their clients' causes have been lost.

Because the decision below conflicts with decisions of other circuits requiring an objective test of counsel's actual conduct as manifested in the complaint, and because it conflicts with the clear meaning of Rule 11, certiorari should be granted.

Finally, avoidance of the imposition of sanctions based on the existence of a reasonable theory in support of the case, even though the theory is not advanced until after the litigation is decided on the merits ignores the language of Rule 11 that the certification is made on the basis of the signer's "knowledge, information and belief." If the signer did not advance the theory until after the case was over, the theory could hardly have been within his knowledge, information and belief at the time that he signed the pleading.

II. THE RATIONALE OF THE COURT BELOW IS IN CLEAR CONFLICT WITH DECISIONS OF THIS COURT.

The unmade argument, which the Court below found not to be frivolous, is for the extension of the doctrine of successor liability "to bind a transferree of assets to the procedural[2] duty to submit to arbitration the question of whether the successor has somehow assumed any of the obligations of the old bargaining agreement." App. at A9. The Court of Appeals, in support of its finding that the Union's complaint and argument on summary judgment was not frivolous, stated:

> [F]ederal courts had not, to our knowledge, considered the question of whether breach of a restraint-on-transfer clause justified imposition of a duty to

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2. While arbitration is itself a contractual procedure, the existence *vel non* of an arbitration procedure is a matter of substantive law. It is beyond cavil that while procedural arbitrability (i.e., whether the procedures set forth in the arbitration provisions have been complied with) is for the arbitrator to decide, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), substantive arbitrability (i.e., whether there is a dispute between the parties the subject matter of which is susceptible to disposition through the arbitration procedure) is for the courts, and the courts alone. *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

> arbitrate on a transferee who was aware of the transferor's obligation.
>
> App. at A10. (citation omitted)

It is submitted that not only has this Court considered the question and ruled decisively, but other federal courts have followed the clear teaching of this Court in *Howard Johnson Co. v. Detroit Joint Board, Hotel & Restaurant Employees*, 419 U.S. 249 (1974). The *Howard Johnson* court stated:

> The mere existence of the successorship clauses in the bargaining agreements between the Union and the Grissoms [the predecessors], however, cannot bind Howard Johnson [the successor] either to the substantive form of the agreements or *to the arbitration clauses thereof*, absent the continuity required by Wiley, when it is perfectly clear the Company refused to assume any obligations under the agreements.
>
> 417 U.S. at 258, n.3 (emphasis added).

This doctrine has been accepted as hornbook labor law. *See, In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 658 F.2d 1149, 1174 (7th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982).

The Court in *Howard Johnson* dealt directly with the distinction drawn by the Third Circuit between the duty to arbitrate (a Section 301 (29 U.S.C. §185) action) and an unfair labor practice proceeding; there is none. *Howard Johnson, supra*, at 256.

Ironically, the court below itself adopted a frivolous argument in its desire to avoid the imposition of sanctions under Rule 11 by giving credence to an argument which ignores clear case law of this Court.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated July 5, 1988

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5665

TEAMSTERS LOCAL UNION NO. 430,
Appellant

v.

HERMAN BROTHERS, INC., et al.

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, *Circuit Judges*.

The petition for rehearing filed by appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT

/s/ CAROL LOS MANSMANN
Circuit Judge

Dated: April 7, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5665

TEAMSTERS LOCAL UNION NO. 430,
Appellant

v.

CEMENT EXPRESS, INC.
LEHIGH PORTLAND CEMENT COMPANY
HERMAN BROTHERS, INC. and
BULK, INC.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE
DISTRICT OF PENNSYLVANIA (SCRANTON)
(D.C. Court No. 85-1196)

Submitted Pursuant to Third Circuit Rule 12(6)
February 4, 1988
Before: SLOVITER, STAPLETON and
MANSMANN, *Circuit Judges*

(Filed March 9, 1988)

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OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

Teamsters Local Union No. 430 appeals from a district court order granting the motions of defendants Herman Brothers, Inc. and Bulk, Inc. for an award of counsel fees as sanctions against Local 430 pursuant to Federal Rule of Civil Procedure 11. The defendant companies succeeded on their motions for summary judgment in the underlying action brought by Local 430 under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, to enforce an arbitration award against Herman Brothers and Bulk. We affirmed. *Teamsters Local Union No. 430 v. Cement Exp., Inc.*, 804 F.2d 1249 (3d Cir. 1986).

On the question of Rule 11 sanctions, however, we find that the plaintiff's argument, though unsuccessful, constituted a good faith argument for the extension, modification, or reversal of the existing labor law doctrine of successor liability. Therefore we will reverse the district court's order awarding counsel fees.

I.

Cement Express, Inc., employed members of Teamsters Local Union No. 430 in executing Cement Express' contract to haul cement for Lehigh Portland Cement Company ("Lehigh"). Cement Express and the union were parties to a collective bargaining agreement containing a comprehensive arbitration clause. The agreement also contained a successorship clause

wherein Cement Express undertook to require a purchaser, transferee or lessee of its operation to be bound by the collective bargaining agreement.[1]

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1. Article 1, Section 1.3 of the agreement provides:

This Agreement and the Supplemental Agreements hereto, hereinafter referred to collectively as "Agreement" shall be binding upon the parties hereto, their successors, administrators, executors and assigns. In the event an entire operation, or rights only, are sold, leased, transferred or taken over by sale, transfer lease, assignment, receivership or bankruptcy proceedings, such operation or use of such rights shall continue to be subject to the terms and conditions of this Agreement for the life thereof. On the sale, transfer or lease of an individual run or runs, or rights only, the specific provisions of this Agreement, excluding riders or other conditions, shall prevail. It is understood by this Section that the parties hereto shall not use any leasing device to a third party to evade this Agreement. The Employer shall give notice of the existence of this Agreement to any purchaser, transferee, lessee, assignee, etc., of the operation covered by this Agreement or any part thereof. Such notice shall be in writing with a copy to the Union not later than thirty (30) days prior to the effective date of sale or thirty (30) days subsequent later. The Local Union shall also be advised of the exact nature of the transaction, not including financial details. In the event the Employer fails to require the purchaser, transferee, or lessee to assume the obligations of this Agreement, the Employer (including partners thereof) shall be liable to the Local Union, and to the employees covered for all damages sustained as a result of such failure to require assumption of the terms of this Agreement, but shall not be liable after the purchaser, the transferee or lessee has agreed to assume the obligations of this Agreement. When a signator to this Agreement purchases rights from another signator, the purchaser must accept the affected employees of the seller, in accordance with the provisions of Article 5, Section 5.5 before hiring any new employees. The application layoff provisions of this Agreement shall apply. When rights are sold to a non-signator to this Agreement, and such purchaser is the sole bidder, the provisions of this Agreement shall not apply. However, in the event of multiple bids, one or more of such bidders being signator to this Agreement, and the seller elects to sell to a non-signator, then all of the provisions of Article 1, Section 1.3 shall apply.

In April, 1985, Cement Express obtained Lehigh's assent to the termination of their cartage contract. Lehigh then entered into a cartage contract with Bulk, Inc. for the same route. Bulk, or Herman Brothers, Inc., purchased for Bulk's use a substantial portion of Cement Express' equipment and invited employment applications from all Cement Express employees. According to the union, Bulk offered wages substantially lower than those paid by Cement Express, and invited applications from the public in general after the union refused those terms. Cement Express ceased operations on May 1, 1985 and permanently laid off all of its employees.

The union filed a grievance on May 13, 1985 against Cement Express, Lehigh, Bulk, and Herman Brothers. By grievance, the union sought to determine whether Cement Express had breached its duty to require the assumption by a transferee of its obligations under the collective bargaining agreement. Bulk and Herman Brothers denied being parties to any agreement with the union and did not appear at the arbitration hearing. The arbitrators deadlocked as to whether Cement Express had met its obligations under the agreement, but they upheld the grievance against Bulk and Herman Brothers. The arbitrators decided that Bulk and Herman Brothers were "successors' under the law and the contract and were obligated by its terms."

II.

The union filed an action in the district court seeking enforcement of the arbitration award. Finding that there was no basis in the pleadings for concluding that the defendants had agreed to honor Cement Express' collective bargaining agreement with the union, the district court granted summary judgment for the defendants, relying on the general rule in *NLRB v. Burns Security Services ("Burns")*, 406 U.S. 272 (1972) (successor employers not bound by the substantive

provisions of a collective bargaining agreement negotiated by their predecessors but not agreed to or assumed by them). We affirmed the summary judgment order, but we relied on the alternate theory that the plaintiff's allegations were insufficient to establish the jurisdiction of the arbitrator either under the collective bargaining agreement or under the labor law doctrine of successorship as set forth in *John Wiley & Sons, Inc. v. Livingston, ("Wiley")*, 376 U.S. 543 (1964) and clarified in *Howard Johnson Co., Inc. v. Hotel Employees*, 417 U.S. 249 (1974).

The district court also granted the defendants' motion for an award of attorneys' fees against the union under Fed.R.Civ.P. 11. The court characterized the action as "frivolous" because a reasonable inquiry would have revealed that there was no basis for the union's claim and because counsel for the union made no effort to support the allegations in opposition to the defendants' motion for summary judgment. The union now appeals from the fee award, asserting that the claim constituted a good faith argument for the extension of the labor law doctrine of successorship and was therefore not frivolous.

Our review of the imposition or denial of sanctions under Rule 11 is limited to determining whether the district court has abused its discretion. *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 485 (3d Cir. 1987).

III.

Federal Rule of Civil Procedure 11 provides in pertinent part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument

> for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The standard for testing conduct under Rule 11 is reasonableness under the circumstances. *Gaiardo* at 482; *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 540 (3d Cir. 1985). As we advised in *Gaiardo*, "[L]itigants misuse the Rule when sanctions are sought against a party or counsel whose only sin was being on the unsuccessful side of a ruling or judgment . . . . Substantially more is required." 835 F.2d at 483. Rule 11 is intended only for exceptional circumstances.

We have stated previously that Rule 11 sanctions are proper only in situations which involve signing a paper. *Id.* at 484. We have cautioned that in testing whether the paper was signed in contravention of Rule 11, "the court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading . . . was submitted." *Id.*, quoting *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 540 (3d Cir. 1985). For example, Rule 11 "should not be invoked against an attorney who fails to dismiss a case after the opposing attorney submits evidence that a statute of limitations or res judicata bars the suit." *Gaiardo* at 484. Rule 11 sanctions are appropriate regarding the initiation of a lawsuit only if the filing of the complaint constituted abusive litigation or misuse of the court's process.[2]

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2. We intimate no view as to whether counsel fees and/or costs could have been imposed on a finding of bad faith. *Ford v. Temple Hospital*, 790 F.2d 342, 348-350 (3d Cir. 1986).

With these principles in mind, we turn to examine the district court's decision to impose sanctions in this case.

IV.

At the outset we observe that the district court erred in imposing sanctions based in part on the finding that the plaintiff "made no effort under Rule 56 to sustain its allegations." As we noted in *Gaiardo*, Rule 11 sanctions may be imposed only for signing a paper in violation of the rule. 835 F.2d at 484. Rule 11 may not be invoked because an attorney, after time for discovery, is unable to produce adequate evidence to withstand a motion for summary judgment.

We turn now to the district court's main reason for the sanction and examine whether the sanction order may be sustained on the theory that the union's action was frivolous. The complaint in this case alleged essentially that Cement Express had a duty under its collective bargaining agreement with Local 430 to secure the assent of its successors by purchase, transfer or lease to be bound by the collective bargaining agreement. It alleged that defendants Bulk and Herman Brothers were successors of Cement Express. The complaint asserted that a grievance against the defendants had been submitted to arbitration in accordance with the provisions of Local 430's collective bargaining agreement with Cement Express, that the grievance had been upheld by the arbitration panel, and that the employers had refused to abide by the terms of the arbitral award. (We note here that the arbitrator found that Herman Brothers and Bulk were "successors' under the law and the contract and were obligated by its terms.")

In its discussion of the imposition of sanctions, the district court did not refer explicitly to the allegations of the complaint. *Burns*, the case relied upon by the district court in imposing the sanctions, did not involve the duty

to arbitrate. 406 U.S. at 286. *Burns* merely established that successor employers are not automatically bound by *substantive* provisions of an agreement not agreed to by them. 406 U.S. at 286. *Burns* did not deal with the question of when successorship doctrine may bind a transferee of assets to the *procedural* duty to submit to arbitration the question of whether the successor has somehow assumed any of the obligations of the old bargaining agreement.

The union argues vigorously that its complaint was based on an attempt to extend the doctrine of successor liability and did not depend upon the express assumption of liability by the defendants. In general, the successor doctrine is an extra-contractual remedial tool for imposing certain labor obligations on a new employer that has taken over the operations of an old employer. *American Bell Inc. v. Federation of Tel. Workers, ("American Bell")*, 736 F.2d 879, 888 (3d Cir. 1984). A limited extra-contractual duty to arbitrate was first recognized in *John Wiley & Sons, Inc. v. Livingston, ("Wiley")*, 376 U.S. 543 (1964). In *Wiley* the arbitrator was held to have jurisdiction to determine what substantive provisions of the bargaining agreement might have survived the transfer of the old employer's operation to the new.

The original arbitration was against the former employer as well as the alleged successors, and was based on the clause of the collective bargaining agreement under which Cement Express was obligated to attempt to obtain the assent of a purchaser to be bound by the collective bargaining agreement. The theory supporting the arbitration is evidenced by the arbitrator's decision as incorporated in the complaint.[3] That

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3. The arbitrator's decision reads as follows:

Based on the facts presented, including the fact that Lehigh Portland Cement arranged the equipment transaction between Cement Express and Herman Brothers/Bulk, Inc.; the

theory appears to be that the defendants, having knowledge of Cement Express' obligation under the collective bargaining agreement and perhaps cooperating to some extent in its breach, were bound by their acceptance of the assets to submit to arbitration under the old agreement. We take no position as to possible grounds for imposing such an obligation except to note that a similar theory was advanced in *American Bell*. Rather than rejecting the theory out of hand, we remanded for fuller development of the record, noting that the federal courts had not, to our knowledge, considered the question of whether breach of a restraint-on-transfer clause justified imposition of a duty to arbitrate on a transferee who was aware of the transferor's obligation. *American Bell*, 736 F.2d at 887, n.18.

The union's tactical error was, perhaps, in proceeding to arbitration in the face of a jurisdictional challenge by the defendants. "The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede *judicial* determination that the collective bargaining agreement does in fact create such a duty. Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori*, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all." *Wiley*, 376 U.S. at 547 (emphasis added).

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fact that all Cement Express former employees were offered employment by Lehigh/Herman Bros./Bulk; that the only two employees used during start-up were former Cement Express employees, and the fact that the two management representatives of Herman Bros./Bulk were fully aware of all terms and conditions, including the successorship obligations of the EACHA when this operation was taken over in this manner, it is the decision of this Committee that Lehigh Portland Cement Company, Herman Brothers, Inc./Bulk, Inc. were "successors" under the law and the contract and were obligated by all its terms. The grievance is upheld.

We note, however, that Rule 11 was designed to penalize abuse of district court process, not an improper submission to arbitration. Whether brought as an action to compel arbitration or as an action to confirm an arbitral award, the threshold question is the same in determining whether the action is a frivolous one. The Rule 11 question in either case is whether, at the time he filed the complaint, counsel for the union could reasonably have argued in support of the arbitrator's jurisdiction over the controversy.

The complaint in this case relied upon an expanded theory of the arbitrability of successor liability which, while novel and unsuccessful, was not plainly unreasonable. Summary judgment is sanction enough for the union's failure to allege facts sufficient to support the claim. We find that the district court abused its discretion in awarding attorneys' fees under Rule 11. Accordingly, we will reverse the order of the district court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-5197 and 86-5251

TEAMSTERS LOCAL UNION NO. 430,
Appellant

v.

CEMENT EXPRESS, INC., LEHIGH PORTLAND CEMENT COMPANY, HERMAN BROTHERS, INC., and BULK, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 85-1196)
District Judge: Hon. William W. Caldwell

Submitted Under Third Circuit Rule 12(6)
October 16, 1986
Before: GIBBONS and BECKER, *Circuit Judges*
and FULLAM, *District Judge**

(Opinion Filed: October 27, 1986)

MEMORANDUM OPINION OF THE COURT

GIBBONS, *Circuit Judge:*

Teamsters Local Union No. 430 appeals from three district court orders. One granted summary judgment in favor of Herman Brothers, Inc. and Bulk, Inc., another granted judgment on the pleadings for Lehigh Portland Cement Company, and the third ordered that the Union

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* Hon. John P. Fullam, Chief Judge, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

pay to the defendants reasonable attorneys' fees in amounts yet to be determined.

The Union concedes that because the amount of the award of attorneys' fees has not yet been determined the fee order is interlocutory, and we may not review it. *Becton Dickinson and Company v. District 65*, No. 85-5776, filed August 25, 1986. The pendency of the application for attorneys' fees does not affect the finality of the order granting summary judgment against all defendants remaining in the case. *Halderman v. Pennhurst State School & Hospital*, 673 F.2d 628, 644 (3d Cir. 1982), *cert. denied*, 465 U.S. 1038 (1984); *West v. Keve*, 721 F.2d 91, 95 (3d Cir. 1983). Thus while we must dismiss the appeal from the order with respect to fees we must address the merits of the summary judgments.

The Union and Cement Express, Inc. were parties to a collective bargaining agreement. Article 7 of that contract contains a comprehensive arbitration undertaking. Article 1, Section 1.3 of the agreement provides:

> This Agreement and the Supplemental Agreements hereto, hereinafter referred to collectively as "Agreement" shall be binding upon the parties hereto, their successors, administrators, executors and assigns. In the event an entire operation, or rights only, are sold, leased, transferred or taken over by sale, transfer lease, assignment, receivership or bankruptcy proceedings, such operation of use of such rights shall continue to be subject to the terms and conditions of this Agreement for the life thereof. On the sale, transfer or lease of an individual run or runs, or rights only, the specific provisions of this Agreement, excluding riders or other conditions, shall prevail. It is understood by this Section that the parties hereto shall not use any leasing Service to a third party to evade this Agreement. The Employer shall give notice of the existence of this Agreement

to any purchaser, transferee, lessee, assignee, etc., of the operation covered by this Agreement or any part thereof. Such notice shall be in writing with a copy to the Union not later than thirty (30) days prior to the effective date of sale or thirty (30) days subsequent later. The Local Union shall also be advised of the exact nature of the transaction, not including financial details. In the event the Employer fails to require the purchaser, transferee, or lessee to assume the obligations of this Agreement, the Employer (including partners thereof) shall be liable to the Local Union, and to the employees covered for all damages sustained as a result of such failure to require assumption of the terms of this Agreement, but shall not be liable after the purchaser, the transferee or lessee has agreed to assume the obligations of this Agreement. When a signator to this Agreement purchases rights from another signator, the purchaser must accept the affected employees of the seller, in accordance with the provisions of Article 5, Section 5.5 before hiring any new employees. The application layoff provisions of this Agreement shall apply. When rights are sold to a non-signator to this Agreement, and such purchaser is the sole bidder, the provisions of this Agreement shall not apply. However, in the event of multiple bids, one or more of such bidders being signator to this Agreement, and the seller elects to sell to a non-signator, then all of the provisions of Article 1, Section 1.3 shall apply.

Cement Express, Inc. ceased operations on May 1, 1985. Formerly it had hauled cement for Lehigh Portland Cement. Herman Brothers and Bulk, Inc. acquired the equipment of Cement Express, Inc. and, according to the Union, offered employment to Cement Express,

Inc. employees. The acquiring companies did not, however, acknowledge that they were bound by the collective bargaining agreement.

The Union, on May 13, 1985, filed a grievance alleging a violation of Section 1.3 by Cement Express, Inc., Herman Brothers, Inc., and Bulk, Inc. The Union contended that by virtue of Section 1.3 Herman Brothers, Inc. and Bulk, Inc. became parties to the agreement. Notified of the hearing on the grievance before the designated arbitrators, Herman Brothers, Inc. and Bulk, Inc. responded by informing the Union's counsel that they were not parties to a collective bargaining agreement with it. They did not appear. Nevertheless the arbitrators decided:

> Based on the facts presented, including the fact that Lehigh Portland Cement arranged the equipment transaction between Cement Express and Herman Brothers/Bulk, Inc.; the fact that all Cement Express former employees were offered employment by Lehigh/Herman Bros./Bulk; that the only two employees used during start-up were former Cement Express employees, and the fact that the two management representatives of Herman Bros./Bulk were fully aware of all terms and conditions, including the successorship obligations of the EACHA when this operation was taken over in this manner, it is the decision of this Committee that Lehigh Portland Cement Company, Herman Brothers, Inc./Bulk, Inc. were "successors" under the law and the contract and were obligated by all its terms. The grievance is upheld.

The arbitrators deadlocked as to whether Cement Express, Inc. violated the contract.[1] The Union filed in the district court an action against Herman Brothers,

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1. The Union and Cement Express, Inc. have agreed to submit the deadlocked grievance to another impartial arbitrator.

Inc., Bulk, Inc. and Lehigh Portland Cement Company seeking enforcement of the arbitrators' award. Lehigh moved for judgment on the pleadings, and the other two defendants moved for summary judgment. These motions were granted, and the Union appeals.

The district court decided in favor of Lehigh because the pleadings establish without dispute that it was never notified of the grievance and thus never offered an opportunity to participate in the arbitration which resulted in the award sought to be enforced. The court held, and we agree, that as to Lehigh the award is a nullity.

Summary judgment was granted for Herman and Bulk on the basis of the following undisputed facts: Cement Express had a contract to transport cement from Lehigh's plant at York, Pennsylvania. In April, 1985, Lehigh terminated that contract and entered into a contract with Bulk for the work in question. Bulk purchased several trucks from Cement Express and invited employees of Cement Express to submit employment applications. Herman is alleged to have taken over some Cement Express operations. Neither Herman nor Bulk entered into a collective bargaining relationship with the Union, and the Union has not been designated as a collective bargaining representative for their employees. The court found no basis for the Union's claim that Herman and Bulk were bound by the arbitration clause on which it relied.

As a preliminary matter, the Union contends that we should enforce the arbitral judgment because courts are bound by the arbitrator's determination that Herman Brothers and Bulk are successors to Cement Express and thus obligated to arbitrate their differences with the Union. That is especially true, claims the Union, because Herman and Bulk failed to sue to enjoin the arbitration and failed to appear before it, thus waiving any objection to having the issue of successorship decided by arbitration. The law plainly states, however,

that questions of arbitrability are for the courts. *American Bell, Inc. v. Federation of Telephone Workers*, 736 F.2d 879, 884 (3d Cir. 1984), and defendants obviously could not waive their rights by refusing to appear before a tribunal which held no jurisdiction over them.

Even if arbitrability is a question for the courts, the Union contends we should enforce the arbitral judgment on our own determination that Herman and Bulk had a duty to arbitrate under the plain terms of the Union's agreement with Cement Express. "The mere existence of the successorship clauses in the bargaining agreements between the Union and [Cement Express], however, cannot bind [Herman Brothers and Bulk] either to the substantive terms of the agreements or to the arbitration clauses thereof . . . when it is perfectly clear the [purchasers] refused to assume any obligations under the agreement." *Howard Johnson Co. v. Detroit Joint Board, Hotel and Restaurant Employees*, 417 U.S. 249, 258 n.3 (1974).

The Union also contends that Herman and Bulk have a duty to arbitrate under the doctrine of implied successorship recognized in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), and clarified in *Howard Johnson*. However, the Union's complaint here fails to allege facts of continuity sufficient to justify an obligation to arbitrate. The complaint makes only one general allegation that defendants "took over by sale, transfer or lease the operations of Defendant Cement Express" (R. 7) and a few specific allegations based on the finding of the arbitrators. The Union's only other allegations are made in its Reply to Amended Statement of Undisputed Facts. It states that Bulk purchased ten tractors and fifteen trailers from Cement Express (R. 65), and it denies defendants' claim that "at no time have a majority of Bulk's employees been former CEI bargaining unit employees." Assuming these allegations true, we find them insufficient to impose a duty to

arbitrate on defendants under *Howard Johnson*. *See American Bell*, 736 F.2d at 888.

The summary judgment and judgment on the pleadings denying the Union's application to enforce the arbitration award will be affirmed. The Union's appeal from the award of fees against it will be dismissed as interlocutory.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Memorandum Opinion.

/s/ JOHN J. GIBBONS

Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

TEAMSTERS LOCAL UNION No. 430, *Plaintiff*	:	
vs.	:	CIVIL ACTION NO. 85-1196
CEMENT EXPRESS, INC., LEHIGH PORTLAND CEMENT COMPANY, HERMAN BROTHERS, INC., and BULK, INC., *Defendants*	:	

ORDER

AND NOW, this 26th day of August, 1987, fees are awarded to Bulk, Inc. and Herman Brothers, Inc., to be paid by plaintiff, in the sum of $3852.448. [sic]

William W. Caldwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

TEAMSTERS LOCAL UNION NO. 430,	:	
Plaintiff	:	
	:	
vs.	:	CIVIL ACTION NO. 85-1196
CEMENT EXPRESS, INC., LEHIGH PORTLAND CEMENT COMPANY, HERMAN BROTHERS, INC., and BULK, INC.,	:	
Defendants	:	

ORDER

AND NOW, this 3rd day of March, 1986, plaintiff's motion for reconsideration of our memorandum and order of January 30, 1986, is viewed as an effort to relitigate the issues disposed of in said order and is DENIED.[1]

William W. Caldwell
United States District Judge

(1) Herman Brothers, Inc. and Bulk, Inc. have included a request for further counsel fees in the body of their brief which opposes plaintiff's motion for reconsideration. This request, if appropriately made, would be denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

TEAMSTERS LOCAL UNION NO. 430,	:	
Plaintiff	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 85-1196
CEMENT EXPRESS, INC.,	:	
PORTLAND CEMENT COMPANY,	:	
HERMAN BROTHERS, INC., and	:	
BULK, INC.,	:	
Defendants	:	

MEMORANDUM

V. Introduction.

Plaintiff, Teamsters Local Union No. 430, filed a complaint pursuant to 29 U.S.C. §185 seeking to enforce a labor arbitration award. After filing an answer, defendants Herman Brothers, Inc. and Bulk, Inc. moved for summary judgment on the grounds that they were not a party to any collective bargaining agreement which would provide a basis for the arbitration award. Defendants have also requested an award of their litigation expenses. For the reasons set forth below, we will grant defendants' motion for summary judgment and their request for litigation costs. Also pending is a motion for judgment on the pleadings filed by Lehigh Portland Cement Company (Lehigh), which will be granted for the reasons which follow.

VI. Background.

The material facts are not in dispute.[1] Plaintiff is a party to a multi-employer collective bargaining agreement known as the Eastern Area Tank and Cement Haul Agreement ("EACHA"). This agreement is effective for the period beginning on March 1, 1983 and ending on February 28, 1986. The EACHA provides that it is "binding upon the parties thereto, their successors, administrators, executors and assigns." Defendant, Cement Express, Inc.,[2] was also a signatory to the agreement and employed individuals represented by plaintiff.

Under a contract with defendant Lehigh, Cement Express transported cement from Lehigh's facility in York, Pennsylvania. In April, 1985, Lehigh terminated its contract with Cement Express and entered into an agreement with defendant, Bulk, Inc. to do its hauling. Bulk, in turn, purchased several trucks from Cement Express and invited the employees of Cement Express to submit employment applications. Defendant, Herman Brothers, along with Bulk and Lehigh is alleged in the complaint to have taken over the operations of Cement Express. Defendants Bulk and Herman, however, have not entered into a collective bargaining agreement with plaintiff, and plaintiff does not represent any of their employees. The complaint does not allege any relationship between plaintiff and Lehigh.

In May, 1985 plaintiff filed a grievance against Herman, Bulk and Cement Express. Herman and Bulk were notified of the grievance by plaintiff's counsel. Herman and Bulk responded by informing plaintiff's counsel that there was no basis for a grievance against

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1. Plaintiff has not responded, by affidavit or otherwise to defendants' supporting affidavit.

2. By Stipulation of the parties filed on September 16, 1985, the complaint was dismissed without prejudice against defendant, Cement Express.

them because they did not have a collective bargaining agreement with plaintiff. Despite defendants' advice the plaintiff presented its grievance to the Eastern Labor Advisory Association, which rendered a decision in favor of plaintiff. Herman or Bulk did not appear or participate in the hearing conducted by the Association.

VII. Discussion.

The standards for ruling upon a motion for summary judgment are set forth in *Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469, 472 (3d Cir. 1985) as follows:

> Summary judgment under Federal Rule of Civil Procedure 56 is appropriate only where the moving party establishes that no genuine issue exists as to any of the material facts in the case, and that he is entitled to judgment as a matter of law. *See, e.g., Hollinger v. Wagner Mining Equipment Co.*, 667 F.2d 402, 405 (3d Cir. 1981). Courts should resolve any doubts as to the existence of issues of material fact against the moving party, and view all inferences in the light most favorable to the nonmoving party. [citation omitted].

Defendants Bulk and Herman Brothers argue that summary judgment should be granted in their favor because they have not entered into collective bargaining agreements with plaintiff. Based upon the absence of such an agreement, defendants contend that there is no obligation on their part to participate in the grievance procedure or abide by the arbitration award. Plaintiff maintains that pursuant to the assigns and successors clause contained in the EACHA, these defendants, as successors, became bound by its terms.[3] But even if we

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3. Plaintiff also argues that we should confirm the arbitrator's award as it draws its essence from the collective bargaining agreement. This argument misses the mark because it assumes

assume that defendants were successors of Cement Express the critical issue is whether defendants became bound to the terms of the EACHA merely by succession.[4] If defendants are nonetheless not bound by the collective bargaining agreement it is obvious that summary judgment must be granted in their favor.

With respect to this issue we are guided by the decision of the United States Supreme Court in *NLRB v. Burns Security Services*, 406 U.S. 272, 32 L.Ed.2d 61, 92 S.Ct. 1571 (1972). In *Burns*, defendant successfully outbid another employer, Wackenhut, on a contract to provide security services. After the contract was awarded, defendant began hiring Wackenhut's former employees. Defendant, however, refused to bargain with plaintiff who recently had been certified as the exclusive bargaining agent of the Wackenhut employees. As a result, plaintiff filed unfair labor practice charges with the National Labor Relations Board ("NLRB"). The NLRB found that defendant committed an unfair labor practice by refusing to recognize plaintiff and ordered defendant to observe the Wackenhut agreement. Defendant appealed, contesting, *inter alia*, the Board's order that it was bound by the preexisting collective bargaining agreement. The Court concluded that while defendant had a duty to bargain, it could not be bound to observe the Wackenhut agreement without its consent. *Id.* at 281-82, 32 L.Ed.2d at 69-70, 92 S.Ct. at 1579. Applying this principle to the facts of the case, the Court found

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NOTES *(Continued)*

that defendants are contractually bound to the EACHA. Additionally, the question of whether defendants were bound to arbitrate this dispute is a matter to be determined by this court, not an arbitrator. *John Wiley & Son, Inc. v. Livingston*, 376 U.S. 543, 11 L.Ed.2d 898, 84 S.Ct. 909 (1964).

4. We are assuming that defendants are successors for purposes of this memorandum and express no opinion as to whether defendants are, in fact, successors.

> Here there was no merger or sale of assets, and there were no dealings whatsoever between Wackenhut and Burns. On the contrary, they were competitors for the same work, each bidding for the service contract at Lockheed. Burns purchased nothing from Wackenhut and became liable for none of its financial obligations. Burns merely hired enough of Wackenhut's employees to require it to bargain with the union as commanded by §8(a)(5) and §9(a).
>
> But this consideration is a wholly insufficient basis for implying either in fact or in law that Burns had agreed or must be held to have agreed to honor Wackenhut's collective-bargaining contract.

Id. at 286-87, 32 L.Ed.2d at 72, 92 S.Ct. at 1581-82.

Based upon this analysis, we find that Bulk and Herman Brothers are not bound by the terms of the EACHA. Defendants have neither expressly agreed to honor the EACHA nor have they implicitly assumed it by their actions. Bulk and Cement Express were competitors, each bidding for the Lehigh contract. After the contract was awarded to Bulk, Cement Express and defendants remained separate entities as there was no merger or transfer of Cement Express's business to defendants. The only contact between Cement Express and defendants involved the sale of certain trucks by Cement Express to Bulk and Bulk's invitation to the Cement Express employees to submit employment applications. Under these circumstances it is clear there is no basis in law or fact for concluding that defendants have agreed to honor plaintiff's collective bargaining agreement and we will grant summary judgment in favor of Bulk and Herman Brothers.

Bulk and Herman Brothers have also requested an award of attorney's fees pursuant to Fed.R.Civ.P. 11 which provides in pertinent part:

> If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

We conclude that this action is frivolous because a reasonable inquiry would have revealed that there is no legal basis for plaintiff's claim, and as we have noted plaintiff made no effort under Rule 56 to sustain its allegations. Counsel for plaintiff was informed on several occasions by defendants that there was no contractual relationship between the parties and plaintiff's conclusions appear to be based on surmise or speculation. Thus, we find that plaintiff's complaint was filed in violation of Rule 11 and we will award defendants a reasonable attorney's fee. If the parties cannot agree to an appropriate award, application may be made to the court.

Insofar as Lehigh is concerned, we agree with plaintiff that the present state of the pleadings does not permit us to determine if Lehigh was a "successor" to Cement Express, and Lehigh's motion could not be granted on this basis. However, it is alleged by Lehigh that not only was Lehigh not named in the plaintiff's grievance, it was not aware of the grievance nor was it given notice of the hearing before the arbitration committee. Plaintiff has not denied or addressed these contentions which we treat as being true and accurate. Thus, Lehigh was not accorded any form of due process by plaintiff and this fundamental defect renders the arbitration a nullity as to Lehigh. Judgment on the pleadings must be granted to Lehigh.

An appropriate order will be issued.

William W. Caldwell
United States District Judge

Date: January 30, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

TEAMSTERS LOCAL UNION NO. 430, *Plaintiff*	:	
vs.	:	CIVIL ACTION NO. 85-1196
CEMENT EXPRESS, INC., LEHIGH PORTLAND CEMENT COMPANY, HERMAN BROTHERS, INC., and BULK, INC., *Defendants*	:	

ORDER AND JUDGEMENT

AND NOW, this 30th day of January, 1986 it is ordered that:

1) The motions of defendants, Herman Brothers, Inc. and Bulk, Inc., for summary judgment are granted and judgments shall be entered in their favor.

2) The request of Bulk, Inc. and Herman Brothers, Inc. for attorney's fees is granted.

3) Judgment on the pleadings is granted in favor of Lehigh Portland Cement Company, and relief against it is denied.

4) The Clerk of Court shall close this file.

William W. Caldwell
United States District Judge

Supreme Court, U.S.
FILED
AUG 5 1988
JOSEPH E. SPANIOL, JR.
CLERK

(2)

No. 88-17

In The

Supreme Court of the United States

October Term, 1988

HERMAN BROTHERS, INC.,
and BULK, INC.

Petitioners,

vs.

TEAMSTERS LOCAL UNION NO. 430

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

Ira H. Weinstock, Respondent's Counsel of Record
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COUNTERSTATEMENT OF CASE

The Respondent, Teamsters Local Union No. 430 (the "Union"), contests the representation made by the Petitioners that the Union "raised for the first time on appeal" the duty of the Petitioners to arbitrate under the doctrine of implied successorship. Petition, p. 6, *see also* p. 4, lines 8-9, sentence beginning with the words" "(t)he only arguments . . ." On the contrary, the record in this case demonstrates that the Union made use of the theory of implied successorship as early as the filing of the complaint. App. at A9-A10 and n.3, A17.

Two facts were deleted from the Petitioners' Statement of the Case. First, the Complaint was filed on August 16, 1985. Second, by letter dated September 16, 1986, after briefs had been filed by these parties with the Third Circuit on the merits of this case, the Third Circuit asked the parties to address two of its recent decisions that discussed successor liability. A copy of that letter is attached to this Brief as Appendix 1. One of the decisions on which the Court of Appeals asked comment actually post-dated the filing of the complaint.

REASONS FOR DISALLOWANCE OF THE WRIT

I. The decision below is in conformity with governing law and with Rule 11 itself.

The Union emphatically disputes the Petitioners' contentions that the decision below conflicts with decisions of other circuits and the language of Rule 11. While the Union agrees with the Petitioners' description of the governing law as being that Courts of Appeals have applied an objective

test to determine whether Rule 11 has been violated, the Union disagrees that the decision of the Third Circuit in this case conflicts in any way with that governing law. On the contrary, the record in this case shows that the Third Circuit in this case applied an objective test to determine that the conduct of the Union was reasonable under the circumstances at the time that the complaint was signed. App. at A7.

The Petitioners' contention that the Third Circuit deviated from governing law is based on a misrepresentation of the record. Specifically, the Petitioner represented that the Union did not raise this issue of implied successorship in front of the district court, but rather waited until the appellate stage to make such an argument. However, the texts of each of the Third Circuit opinions in this case contradict this representation. In its opinion addressing the Rule 11 determination, the Third Circuit stated: "The theory supporting the arbitration is evidenced by the arbitrator's decision as *incorporated in the complaint*". (Emphasis added) (footnote deleted). App. at A9. The court then set forth in a footnote the language of the arbitral decision that has been incorporated into the complaint. That language listed a variety of facts on which the arbitrators based their decision that the Petitioners herein were "successors":

> Based on the facts presented, including the fact that Lehigh Portland Cement arranged the equipment transaction between Cement Express and Herman Brothers/Bulk, Inc.; the fact that all Cement Express former employees were offered employment by Lehigh/Herman Bros./Bulk; that the only two employees used during start-up were former Cement Express employees, and the fact that

> the two management representatives of Herman Bros./Bulk were fully aware of all terms and conditions, including the successorship obligations of the EACHA when this operation was taken over in this manner, it is the decision of this Committee that Lehigh Portland Cement Company, Herman Brothers, Inc./Bulk, Inc. were "successors" under the law and the contract and were obligated by all its terms. The grievance is upheld.

App. at A9-A10 and n.3

Moreover, in its opinion addressing the summary judgment determination, the Third Circuit noted "facts of continuity" alleged by the Union in the complaint "to justify an obligation to arbitrate". App. at A17.

Accordingly, it is absurd to assert, as do the Petitioners, that the case for implied successorship was made by the Union for the first time at the appellate stage. For the same reasons, the Petitioners' framing of the key issue is nonsensical. As articulated by the Petitioners, such purported issue is "whether the mere existence of '. . . a good faith argument for the extension, modification, or reversal of existing law' can insulate counsel from the imposition of sanctions, although the 'argument' was never made on the merits of the case." Petition, p. 9. As demonstrated by the texts of the Third Circuit opinions, this statement of the issue makes no sense. It is evident that the Union made the argument for the extension of the successorship doctrine to the facts of this case on the day that the complaint was filed.

The Petitioners also assert that the prevailing law on Rule 11 requires the conduct of the signer of the pleading to be judged by the arguments that he eventually made in support of the pleading, not by the arguments that he could have made, but did not. They argue that the Third Circuit is in conflict with this prevailing law on account of language in the opinion in question as follows: "The Rule 11 question . . . is whether at the time he filed the complaint, counsel . . . could reasonably have argued in support (of the complaint)." App. at All.

In making this argument, the Petitioners mischaracterize the holding of the court below. In stressing the above quotation, they imply that the Third Circuit held that Rule 11 sanctions are inappropriate if any conceiveable argument could be made at the time of the signing of the complaint, even if such argument were not, in fact, made. Most assuredly, this was not the holding of the Third Circuit. Such a holding would have been nonsensical given the record in this case, in which the Third Circuit acknowledged in the texts of both its opinions that facts supporting the argument for implied successorship were, in fact, set forth in the complaint. App. at A9-A10 and n.3; App. at A17. In addition, the record reveals that, subsequent to the filing of the complaint, the Union set forth additional factual averments relating to the successorship issue. Specifically, the Union's Reply to Amended Statement of Undisputed Facts, submitted as part of the Union's response to the Petitioners' dispositive motions before the district court, alleged additional "facts of continuity" linking Petitioner Bulk, Inc. to the previous contractor who was a signatory to the collective bargaining agreement. App. at A17.

Finally, the best indication that the argument in support of the doctrine of successorship was actually made in

litigation before the district court is the following language contained in the court's opinion granting summary judgment against the Union:

> Based upon this analysis, we find that Bulk and Herman Brothers are not bound by the terms of the (collective bargaining agreement). Defendants have neither expressly agreed to honor the (collective bargaining agreement) *nor have they implicitly assumed it by their actions.*

App. at A25 (emphasis added).

With the emphasized language, the district court acknowledged and rejected the argument of implied successorship. There can be no better indication that the Union had raised the issue on the merits, contrary to the representations of the Petitioners herein.

For all of the foregoing reasons, the Union respectfully asserts that the Third Circuit's opinion is in conflict with neither the law of other circuits nor Rule 11 itself. Despite the Petitioners' representations to the contrary, the Third Circuit applied an objective test to the actions of the Union in filing the complaint and based its determination on issues and arguments of record raised before the district court.

II. The decision below is in accordance with the law of the Court.

The Petitioners contend that the opinion of the Third Circuit is in conflict with the law of this court, particularly the decision of *Howard Johnson Co. v. Detroit Joint Board,*

Hotel and Restaurant Employees, 417 U.S. 249 (1974). However, the very quotation that the Petitioners chose to illustrate the holding of that decision undermines their argument:

> The mere existence of the successorship clauses in the bargaining agreements between the Union and the (predecessors), however, cannot bind (the successor) either to the substantive form of the agreement or to the arbitration clauses thereof, *absent the continuity required by Wiley* . . .

417 U.S. at 258, n.3 (emphasis added).

The reference to "Wiley" was, of course, to this Court's decision in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). The emphasized portion of the quotation from the *Howard Johnson* decision illustrates that special circumstances can arise under which a successor can be bound by the terms of a collective bargaining agreement that it has not signed. By incorporating in the complaint the actual arbitral decision, which contained key factors linking predecessor to successor, the Union was alleging facts of continuity in order to bring itself within the scope of *Wiley* and its progeny. App. at A9-A10 and n.3.

The quotation from *Howard Johnson* and its reference to *Wiley* also illustrates that point that the law of successorship liability is not unchangeable. *See generally Fall River Dyeing & Finishing Corp. vs. NLRB,* ____ U.S. ____, 107 S.Ct. 2225, 96 L.Ed.2d 22 (1987). The Third Circuit in the instant matter did not defy the established law of this Court. Rather, it followed that law in recognizing, where the district court did not, that under some circumstances a successor

may be held to the terms of a collective bargaining agreement that it had not signed.

There is no better example of the dynamic nature of the law of successorship than the fact that, around the time when the complaint was filed, the Third Circuit had recently decided one case and had yet to decide another case, both of which discussed issues of successorship. During the Union's appeal on the merits, the Third Circuit solicited comment from the parties herein on the applicability of those cases. A copy of the Third Circuit letter to the parties is attached to this brief as an Appendix.

The letter was issued *more than a year after* counsel for the Union filed the complaint. One of the decisions on which the Third Circuit sought comment was decided *almost a year after* the complaint was filed. Given the time sequence of these events, the Third Circuit's opinion that the Union's filing of the complaint was not unreasonable at the time it was filed is persuasive indeed.

CONCLUSION

For the reasons set forth above, the Union respectfully requests that the Court disallow the writ.

Respectfully Submitted,
ON BEHALF OF APPELLEES

By: _____ By: _____
IRA H. WEINSTOCK
Counsel of Record
GERARD M. MACKAREVICH

DATED: August 4, 1988

OFFICE OF THE CLERK

SALLY MRVOS
CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
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September 16, 1986

SEP 18 1986

(Ira H. Weinstock, Esq.
(Paul J. Dellasega, Esq.

Walter J. Flamm, Jr., Esq.

(Larry J. Rappoport, Esq.
(Charles J. Bloom, Esq.

Re: Teamsters Local Union No. 430, Appellant
v.
Cement Express, Inc., et al.,
Docket Nos. 86-5197 and 86-5251

Dear Counsel:

The Court wishes counsel in the above-entitled case to comment on the following questions:

1. In light of Becton Dickinson and Company v. District 65, No. 85-5776 filed July 25, 1986, can we consider the appellant's appeal with respect to the award of counsel before the amount of the award is fixed.

2. Comment on the applicability of American Bell, Inc. v. Federation of Telephone Workers, 736 F.2d 879 (3d Cir. 1984) and AT&T Information Systems, Inc. v. Local 13000 Communications Workers of America, AFL-CIO, Nos. 85-1379 and 85-1400 filed August 1, 1986.

Counsel should respond simultaneously by letter within seven days of the date of this letter. An original and three copies of the letter should be filed together with proof of service on opposing counsel.

Very truly yours,

SALLY MRVOS, Clerk

By: M. E. Angelotti Sergeant
Chief Deputy Clerk

MEF:as

APPENDIX I

CERTIFICATE OF SERVICE

AND NOW, this 5th day of August, 1988, I, Ira H. Weinstock, Counsel of Record for Respondent, hereby certify that I served three (3) copies of the foregoing **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** by depositing the same in the United States mail, postage prepaid, in the post office at Harrisburg, Pennsylvania, addressed to, by first class mail:

Walter H. Flamm, Jr.
Clark, Ladner, Fortenbaugh & Young
32nd Floor, 1818 Market Street
Philadelphia, PA 19103

By: Ira H Weinstock
IRA H. WEINSTOCK

